No. 790

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CLERK

IN THE

Supreme Court of the United States

October Term 1940

JOHN T. WALKER, MATILDA W. CONSTABLE, JAMES K. MERSEBERG, MALIA K. BLAISDELL, IDA LEE KWAI, WILLIAM K. MERSEBERG, HELEN P. TAM, MADELINE SAKAI, DELMAS L. JOY, BARNEY K. JOY, MAISIE K. DOANE, COULSON C. JOY, CUMMINS S. JOY, ELIZABETH P. J. GOEAS, FRANCIS B. JOY, Guardian of Thelma H. Joy, Wesley J. Joy, and Elaine K. Joy, minors, JOHN K. CLARKE, Guardian of Nellie Aipia, a minor, JOHN A. CUMMINS, THOMAS P. CUMMINS, RAPLEE K. CUMMINS, MOSELEY K. CUMMINS, WOOD K. CUMMINS and BRICKWOOD K. CUMMINS,

Petitioners,

vs.

RAY J. O'BRIEN and HAWAIIAN TRUST COMPANY, LIMITED, Trustees of the Trust Estate of John A. and Kahalewai Cummins under Deed of Trust Dated October 1, 1896, and MARGARET MAMO CLARK,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable
The Supreme Court of the United States:

Petitioners above named pray that a writ of certiorari issue to review the decree of the United States Circuit

Court of Appeals for the Ninth Circuit made in the above entitled cause on December 3, 1940 (R. 235), which affirmed the decree of the Supreme Court of Hawaii entered on February 15, 1940 (R. 184).

SUMMARY STATEMENT OF THE MATTER INVOLVED

John A. Cummins, a resident of Honolulu, Hawaii, in 1896 conveyed certain real estate to a trustee, upon trust to manage the same and to pay the net income to his wife and to himself for life, and after their death to his four children for life, and upon the death of the last surviving child the trust estate should be distributed to "the lawful issue of the children aforesaid then surviving, such issue to take by right of representation" (R. 37).

John A. Cummins died in 1913, his wife having predeceased him. Their last surviving child died in 1937 (R. 211).

Three of the children named in the deed left lawful issue them surviving, some of whom are the petitioners herein. The fourth child named in the deed died without leaving a child of her own, but in 1914 she had adopted a daughter whose name is Margaret Mamo Clark, one of the respondents herein.

At the date of the execution of the trust deed (1896) no children had been adopted into the family of John A. Cummins (R. 211). Moreover, the common law on the subject of adoption was unaffected by legislation in Hawaii until 1905 when adopted children were made heirs of the adoptive parents.

Upon the death of the last surviving child the present trustees filed their final account and asked the instruc-

tions of the court as to whom the principal of the trust estate should be distributed as the issue of the four children of the settlor, and whether an adopted child of one of the settlor's children was "lawful issue" under the trust instrument (R. 2).

Respondent Margaret Mamo Clark, the adopted child of one of the settlor's four children, claimed that she is "lawful issue" of her adoptive mother and hence is entitled to receive one-fourth of the trust estate. The Supreme Court of Hawaii sustained her contention.

The issue of the three children of John A. Cummins other than his daughter May K. Clark appealed to the Circuit Court of Appeals for the Ninth Circuit, which on December 3, 1940, entered a decree affirming the decree of the Supreme Court of Hawaii (R. 235).

OPINIONS BELOW

Opinion of the trial court (unreported) dated May 20, 1938 (R. 79).

Opinion of the Supreme Court of Hawaii dated August 11, 1939, 35 Haw. 105 (R. 123).

Opinion of the Circuit Court of Appeals dated December 3, 1940, 115 Fed. (2d) ———— (R. 230).

JURISDICTION

The decision of the Court of Appeals was rendered on December 3, 1940, and the mandate has been stayed pending the filing and disposition by this court of this petition (R. 236).

The jurisdiction of this court is invoked under Sec-

tion 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U.S.C., Title 28, Section 347).

QUESTION PRESENTED

Is Respondent Margaret Mamo Clark, the adopted daughter of May K. Clark, lawful issue of her adoptive mother within the meaning and intent of the deed of John A. Cummins and hence entitled to one-fourth of the trust estate?

REASONS FOR ALLOWANCE OF WRIT

This cause involves the construction of a deed of trust executed in 1896 in which the settlor, a resident of Hawaii, made an irrevocable trust of his property in favor of his wife and himself for life, his children for life, and upon the death of the last surviving child directed that the corpus be distributed "to the lawful issue of the children aforesaid." The settlor died in 1913. His wife predeceased him. Their last surviving child died in 1937. Three of their children named in the deed of trust left lawful issue them surviving. The fourth died without leaving a child of her own, but in 1914 had adopted a daughter, Margaret Mamo Clark.

The question is whether or not an adopted child of one of the settlor's children is "lawful issue" within the meaning of the trust deed. The Supreme Court of Hawaii, by a divided court,[1] answered this question in the affirmative.

The overwhelming weight of authority is to the effec

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[1] Circuit Court Judges Le Baron and Brooks sitting in place of two Justices of the Supreme Court disqualified. Chief Justice Coke dissenting.

that the term "lawful issue" in a written instrument means descendants of the blood. Prior decisions of the Supreme Court of Hawaii have recognized that the primary meaning of these words is descendants of the blood. (*Rooke v. Queen's Hospital,* 12 Haw. 375, 396, et seq.)

The rule that an adopted child is not "issue" of its adoptive parents within the meaning of a deed or will where, as here, the donor was a stranger to the adoption, has been departed from only in two or three isolated cases which were decided in jurisdictions wherein there was in force, when the deed or will was made, a statute making adopted children heirs of the adoptive parents, but there is no decision anywhere in the common law world that makes such a departure where no such statute was in effect.

The Circuit Court of Appeals, without approving or even examining the reasoning of the Hawaiian Court, affirmed the decree of that court upon the ground that the conclusion of the Hawaiian court was "not manifestly erroneous." No attempt was made by the court below to consider or analyze the character or degree of the error committed by the Hawaiian court. The conclusion of affirmance was arrived at in supposed obedience to the decision of this court in *Waialua v. Christian,* 305 U. S. 91. This action by the lower court has deprived petitioners of any substantial review in that court which is accorded them by Section 128 of the Judicial Code as amended.

The opinion below proceeds upon the basis that so long as the court announces its allegiance to the familiar rule (that the judgment of a Territorial court will not be dis-

turbed in the absence of manifest error) the task of the circuit court of appeals is done.

We believe that where the Hawaiian court had made a clear departure from ordinary legal principles and the case is before the circuit court of appeals for review, it is the duty of that court to reverse the Hawaiian court. Nothing in the decision of this court in *Waialua v. Christian* is contrary to that view. The inherent difficulty in applying the standard laid down by this court cannot sanction the lower court's refusal to grapple with the problem presented.

If the decision below is to stand, no litigant in the Territory of Hawaii will ever be able to accurately judge his likelihood in getting a review in the circuit court of appeals from a decision of the Hawaiian court, no matter how erroneous the decision may be. In effect this decision makes all decisions of the Hawaiian court (whether manifestly erroneous or not) final. If by the mere statement, without analysis, that the decision of the Hawaiian court is not manifestly erroneous, the duties of the circuit court of appeals imposed by the Judicial Code are discharged, then that section of the Act is in effect repealed.

The words "lawful issue" in a deed or will have had an accepted meaning by courts and lawyers from the earliest times. They are words of art. Many trusts and wills have been drawn in reliance upon their settled meaning. To give those words a meaning different from that universally accepted, and upon which men have acted for generations, is manifestly erroneous.

The Court of Appeals in its opinion gives no clue to what standards, if any, are to be applied in determining when error is sufficiently bad to warrant a reversal. Diffi-

cult as the process of formularization is, the rule can only be given content by the impact of adjudicated cases in which the reasons for inclusion or exclusion are made known. The decision below, by making no effort to analyze the character or degree of error committed by the Hawaiian court, leaves litigants in complete darkness as to whether or not that court will ever reverse the decree of the Hawaiian court. This, we submit, was never intended by this court in *Waialua v. Christian,* 305 U. S. 91. Hence this court in the exercise of its supervisory jurisdiction should entertain this cause in the interest of clarifying the legal order of the whole Territory of Hawaii.

The reasons for allowance of the writ may be summarized as follows:

(1) The result reached by the Hawaiian court, unsupported by any decided case involving similar facts, constituted a clear departure from ordinary legal principles, and it became the duty of the court below to examine the cause on its merits and to reverse the decree appealed from;

(2) The action of the court below in affirming the decree of the Hawaiian court without an examination of the reasoning of that court virtually repeals Section 128 of the Judicial Code as amended, thus leaving litigants in doubt as to whether or not any right of review of the decrees of the Supreme Court of Hawaii exists;

(3) The court below misinterpreted the rule laid down by this court in *Waialua v. Christian,* 305 U. S. 91, in construing it to require a blind affirmance of the Hawaiian court without the necessity of any examination into its reasoning or the kind or degree of error committed by the Hawaiian court;

(4) The decision of the court below gives no inkling as to what standards, if any, are to be applied in determining what is "manifest error" by the Hawaiian court;

(5) This court, by granting the writ in this cause, can give some content to the rule which the court below thought it was following. A review of this cause by this court will serve to clarify the jurisprudence of the entire Territory and the duties of the Circuit Court of Appeals in reviewing decisions of the Hawaiian court, which the opinion below leaves in chaos.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that court to certify and to send to this court for its review and determination a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled in its docket as "No. 9533, John T. Walker et al, Appellants, v. Ray J. O'Brien, et al, Appellees," and that the decree of said court be reversed by this court and for such further relief as to this court may seem proper.

DATED: Honolulu, Hawaii, February 6, 1941.

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